

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission
On Its Own Motion

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Docket No. 08-0312

Review of the Original Cost Audit of
Commonwealth Edison Company

**REPLY BRIEF ON EXCEPTIONS OF THE
STAFF OF THE ILLINOIS COMMERCE COMMISSION**

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December 2, 2009

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**BRIEF ON EXCEPTIONS OF THE
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Now comes the Staff of the Illinois Commerce Commission ("Staff"), by and through its undersigned attorneys, and pursuant to Section 200.830 of the Commission's Rules of Practice, 83 Ill. Adm. Code Section 200.830, respectfully submits this Reply Brief on Exceptions to the Briefs on Exceptions filed by the People of the State of Illinois ("AG BOE") and Commonwealth Edison Company ("ComEd" BOE) on November 25, 2009 in response to the Proposed Order issued by the Administrative Law Judges ("ALJs") on November 12, 2009 ("Proposed Order" or "PO").

I. ARGUMENT

A. Response to AG

The People of the State of Illinois ("AG") argue that the Commission should order Commonwealth Edison Company ("ComEd") to refund to customers over \$26.225 million (with an additional \$1.425 million per month until a final order is issued in this matter. AG Exhibit 2.0, p. 9. Lines 196-199) for alleged over payments for the period

that the rates approved in dockets 05-0597 and 07-0566 were or have been in effect. AG BOE, pp. 5 and 7. Staff disagrees as previously set forth in its Initial Brief and Reply Brief. Ratepayers have not been overcharged; and there should be no refund to ratepayers. If the Commission were to order ComEd to refund money back to customers such an order would violate the rule against retroactive-ratemaking. Staff IB, p. 6; Staff RB, pp. 3-4.

Staff disagrees with the AG's position that ratepayers have been overcharged in the past. As Staff set forth in its Initial Brief and Reply Brief, Mr. Effron calculated the effect of the accounting change on the Company's revenue requirements from Docket Nos. 05-0597 and 07-0566 because Mr. Effron believes that ComEd has already recovered the cable fault costs during the 2002-2006 period. AG BOE, p. 5. Staff's position is that Mr. Effron's assumption views the effect of ComEd's change in its accounting policy in isolation from the other components of the revenue requirement. ICC Staff Exhibit 2.0, pp. 2-3. Staff witness Struck explained in his testimony that:

in between rate cases, utilities recover their costs in the aggregate, whatever their composition, rather than line item by line item. Mr. Effron's double recovery argument considers the cable fault expenditures as a single line item rather than in the aggregate with other costs incurred during the 2002-2006 time period. Mr. Effron is correct that in 2002 ComEd began treating as an asset cable fault repair expenditures it previously treated as an expense. However; it does not automatically follow that the change in this item, in and of itself, caused ComEd to recover more that it should in the aggregate during 2002-2006 so as to enable future double recovery as Mr. Effron asserts.

Id., p. 3 For this reason Staff recommends that the Commission reject AG witness Effron's argument. Staff IB, p. 6; Staff RB, pp. 3-4.

With regard to the issue of whether the Commission should order a refund back to customers under the assumption that there was an overcharge, as Staff set forth in

its Reply Brief, the AG's position would violate the rule against retroactive-ratemaking. Staff RB, pp. 4-5. The relevant case law on this issue is the Illinois Supreme Court's decision in Citizens Utilities Co. of Illinois v. Ill. Commerce Comm'n, 124 Ill. 2d 195 (1988). The rule against retroactive-ratemaking prohibits refunds when rates are too high, and surcharges when rates are too low. Id., at 207. In Citizens, the Commission ordered a reduction to rate base based on the difference between the tax expense received by the utility for ratemaking purposes over a 25 year period and the taxes actually paid by the utility. Id., at 202. The Supreme Court found that the reduction to rate base denied retroactively tax benefits that the Commission had previously permitted the Company to enjoy for 25 years. The court found that action to conflict with fundamental ratemaking in Illinois and to be a violation against the rule against retroactive-ratemaking. Id., at 207. It is clear from the AG's Initial Brief and BOE that the AG believes rates were too high for the period when the rates approved in 05-0597 were in effect and are still too high for the period that the rates approved in 07-0566 have been in effect (April 1, 2002 to present). The AG wants those alleged overcharges to be refunded back to customers. AG IB, p. 13; AG BOE, pp. 5 and 7. As Staff explained in its Reply Brief, it is hard to imagine a more blatant violation of the rule against retroactive-ratemaking. Staff RB, p. 5.

Based upon the arguments presented above and the arguments previously made by Staff in its Initial Brief and Reply Brief, the AG's arguments should be rejected.

B. Response to ComEd

ComEd filed two exceptions to the PO. The first exception addressed the issue of including language in the order indicating, consistent with the stipulation between

Staff and ComEd, that the stipulated resolutions should not be considered precedential for other cases. While Staff submitted proposed language to implement this same recommendation, Staff has no objection to ComEd's proposed language and accepts same. The second exception was that language should be removed from the PO addressing the appeal of ComEd's 2005 rate case given the fact that the Second District Court Appellate Court affirmed the Commission's decision. Staff has no objection to this exception. Thus, Staff does not object to either of ComEd's exceptions or its proposed language modifications.

II. CONCLUSION

WHEREFORE, for all the reasons set forth herein, Staff respectfully requests that the Illinois Commerce Commission approve Staff's recommendations in this docket.

Respectfully submitted,

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